IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1062 of 2000

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA

HONOURABLE MR.JUSTICE K.A.PUJ

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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RUGNATHJI BHURAJI NAI - Appellant
Versus
THE STATE OF GUJARAT - Opponent

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Appearance :
MS SADHANA SAGAR for Appellant.
MR RC KODEKAR, APP for Opponent.

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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

and

HONOURABLE MR.JUSTICE K.A.PUJ

Date : 29/09/2006
ORAL JUDGMENT
(**Per : HONOURABLE MR.JUSTICE K.A.PUJ**)

1. The present appeal is filed by the appellant-original accused against the judgment and order dated 27.09.2000 passed by the learned Special Judge and Additional Sessions Judge, Deesa in Special Case No. 139 of 1999 convicting the appellant under Section- 18 of the Narcotic Drugs & Psychotropic Substance Act, 1985 (hereinafter referred to as “the Act”) and sentencing him to suffer rigorous imprisonment for a period of 10 years and fine of Rs. 1 Lacs and in default thereof, to undergo further R.I of one year.

2. The case of the prosecution is that the complainant – Nagjibhai Ajaji Barot was discharging his duty in border wing in first batallian company, Palanpur, and was assigned the duty at Vasan Check Post, along with other police personnels and on the date of incident i.e. 11.7.1999 at about 1.30 p.m., P.W. 1 – Amrutbhai Vaghjibhai – Exh. 5, Guardman in Border Wing held the

Truck bearing Registration No. GJ-8-T-4550 and he and the complainant found opium from the possession of the accused who was travelling and sitting in the cabin of the said Truck along with driver and cleaner. The complainant found the accused in possession of narcotic substance in a plastic bag around 200 Grams. The complainant thereafter intimated the incident to Sub-Inspector Mr. Kalavadiya of border wing through wireless message and thereafter, have proceeded to Dhanera Police Station and at about 4.40 p.m., the narcotic substance was weighed by summoning Jitendra Harjivanbhai Soni and samples were taken to F.S.L. for analysis in the presence of panch witnesses and thereafter, C.R. No. 5069 of 1999 was registered at Dhanera Police Station.

3. Pursuant to the registration of the offence, the investigation was put into motion. During the course of investigation, statements of the witnesses were recorded. Based on the F.S.L. Report, since sufficient incriminating evidence was found against the accused, he was charge-sheeted in the Court of learned Special Judge, Deesa. The learned Special Judge, Deesa framed

charge against the accused for commission of the offence punishable under Section 18 of the Act.

4. The charge was read over and explained to the accused. As the accused has not pleaded guilty to the said charge, he was put to trial and tried by the learned Special Judge, Deesa in Special Case No. 139 of 1999.

5. To prove the culpability of the accused, prosecution has in all examined as many as 13 witnesses. Prosecution has also produced several documents and relied upon the contents of the same. After recording of the evidence of the prosecution witnesses was over, the learned Special Judge, Deesa explained the accused the circumstances appearing against him in the evidence of the prosecution witnesses and recorded his further statement, as required under Section 313 of the Code. In his further statement, the accused denied the case of the prosecution by reiterating that he has been falsely implicated.

6. On appreciation, evaluation, analysis and close scrutiny of the evidence adduced by the prosecution, the learned

Special Judge, Deesa has held that the prosecution has established beyond reasonable doubt that the charge levelled against the accused was proved and, therefore, the accused was held guilty of the offence punishable under Section 18 of the Act. The learned Special Jude, Deesa has, thereafter, heard the accused and his advocate on sentence and looking to the gravity of the offence committed by the accused and looking to the circumstances, original accused was sentenced to suffer rigorous imprisonment of 10 years and fine of Rs. 1 Lac and in default thereof, to undergo R.I. of one year.

7. Being aggrieved and dissatisfied with the said judgment and order dated 27.09.2000, the present appeal is filed by the accused before this Court under Section 374 of the Code of Criminal Procedure.

8. Ms. Sadhna Sagar, learned advocate appearing for the appellant has taken us through the oral as well as documentary evidence which are on record and also assailed the judgment and order of the learned Special Judge, Deesa dated 27.09.2000. She has further submitted that the learned Special Judge has erred in

convicting the appellant though there was no cogent or adequate evidence showing his guilt in the matter. She has further submitted that the learned Special Judge, Deesa has failed to appreciate that the appellant is innocent and has not committed the alleged offence. The Panch witnesses have not supported the case of the prosecution at all. Other independent witnesses have also not supported the case of the prosecution. Except the evidence of police witnesses, there is no iota of evidence on the record of the case. The conviction in such a serious offence and the awarding of sentence of 10 years rigorous imprisonment and fine of Rs. 1 Lac on the basis of evidence of the witnesses of police personnel only is not proper, legal and valid and, therefore, the impugned judgment and order is required to be quashed and set aside.

9. Ms. Sadhna Sagar has further submitted that while convicting the appellant – accused, the learned Special Judge has not considered the submissions made on behalf of the appellant – accused in their proper perspective and has wrongly erred in coming to the conclusion that the conviction can be based only on the

evidence of the witnesses belonging to the police department. If no independent witness is available at the relevant time, then one can understand that there cannot be evidence of independent witnesses and the evidence can be of the officers investigating the case and, in such circumstances, their evidence can be accepted in a given case. However, in the present case, independent witnesses were available during investigation, their statements have been recorded and panchnama was prepared in presence of two independent panch witnesses, and if those witnesses are not supporting the case of the prosecution in their deposition before the Court, then, in such circumstances, the conviction cannot be made only by relying upon evidence of the witnesses belonging to the police department. She has further submitted that the law is well settled on this point by various judgments of the Hon'ble Supreme Court as well as this Court and the learned Special Judge has not taken into consideration the principles laid down in those judgments.

10. She has further submitted that muddamal article opium weighing about 200 Grams has not been found from the

conscious possession of the accused. The evidence led by prosecution with regard to muddamal article is contrary to and in contradiction with each other. P.W. 3 – Nagji Ajaji, P.W. 1 – Amrutbhai Vaghjibhai, and P.W. 7 – Harshadrai Z. Kalavadiya are giving conflicting and contradictory versions in their depositions before the Court and hence, their evidence could not have been relied upon. The provisions contained under Sections 42, 50, 55 & 57 of NDPS Act as well as Section 102 (3) of Cr.P.C. have been violated and since the prosecution has failed to prove beyond reasonable doubt the offence alleged against the accused under Section 18 of the Act, the impugned judgment is required to be quashed and set aside.

11. Ms. Sagar has further submitted that P.W. 1 – Amrutbhai Vaghjibhai – Exh. 5 in his deposition has stated that on 11.7.1999 at about 1.30 p.m., Truck No. GJ-8-T-4550 was checked at Vasan check post and at that time, the driver and one passenger were sitting in the cabin. Thereafter, he has stated that in the said cabin, driver, cleaner and accused were sitting. The female passengers were sitting in the back side of the Truck.

She has further submitted that on the basis of this prosecution witness, when driver, cleaner and accused all were sitting in the cabin of the Truck, it cannot be said that the bag containing muddamal article was belonging to the accused.

12. She has further submitted that P.W. 1 – Amrutbhai has stated that at the check-post, the vehicle checking register is kept and in that register, the vehicle number, name of the driver and if any objectionable thing is found during checking, necessary entry to this effect is made in the register. The prosecution has produced zerox copy of one page of vehicle checking register at Exh. 12 and the original register is produced at Exh. 14. In these two documents, the vehicle registration number GJ-8-T-4550 as well as driver and cleaner's name are mentioned. However, there was no reference regarding muddamal article found from the accused. If the muddamal article was found from the accused, necessary entry should have been made in the Register. P.W. 1 – Amrutbhai – Exh. 5 has admitted in his deposition that the platoon commander Harshadrai Z. Kalavadiya has not taken any report in writing from him and Nagjibhai Ajaji has given

such report to Shri Kalavadiya. Shri Kalavadiya has stayed at the place of incident for about two hours and after calling the panch witnesses, the panchnama was drawn at Vasan check post. The prosecution has not produced the report made by Amrutbhai Vaghjibhai and Nagjibhai Ajaji to Shri Kalavadiya as well as the panchnama drawn at Vasan check post. Thus, a doubt is raised as to whether in the first report, name of the accused was there or not. It is also not certain as to what were the contents of the panchnama. Thus, the case of the prosecution raises a very serious doubt and suspicion.

13. She has further submitted that the prosecution has produced a register at Exh. 13 showing the presence of Nagjibhai Ajaji as well as Amrutbhai Vaghjibhai. However, there was no stamp on this register. It cannot be accepted as an authorised register and hence, a doubt is raised to the effect that the original register was misplaced and duplicate register was prepared only with a view to show presence of these two prosecution witnesses.

14. Ms. Sagar has further submitted that the provisions contained in Section 50 of the Act have not been complied with. P.W. 1 – Amratbhai Vaghjibhai, P.W. 3 – Nagjibhai Ajaji Barot and P.W. 7 – Harshadrai Zaverbhai Kalavadiya have not taken the search of the accused and simply the accused has stated that there was opium in liquid form in the plastic bag and that was accepted by these witnesses and thereafter, the Truck driver, cleaner and accused all have gone to Dhanera Police Station with Nagjibhai. At Dhanera Police Station, personal search of the accused was not carried out. She has, therefore, submitted that there is violation of the provisions contained in Section 50 of the Act. There is violation of the provisions contained in Section 42 (2) of the Act as the information was not reduced in writing as before drawing panchnama, the head constable Somabhai Manjibhai should have written the information in writing which he has received from Nagjibhai Ajaji Barot and Shri Harshadrai Zaverbhai Kalavadiya and one copy of the said information should have been sent to the higher official as required under Section 42 (2) of the Act. Since this has not been done, prosecution case deserves to be vitiated on this ground.

15. Ms. Sagar has further submitted that even P.W. No. 7 - Harshadrai Zaverbhai Kalavadiya – Sub Inspector has also not reduced the information in writing nor he has sent this information to his superior officer and hence, there was violation of Section 42 (2) of the Act. Provisions contained in Sections 55 & 57 of the Act are also violated. As per the provisions contained in Section 55 of the Act, an officer-in-charge of a police station shall take charge of and keep in safe custody, pending the orders of the Magistrate, all articles seized under this Act within the local area of that police station and which may be delivered to him, and shall allow any officer who may accompany such articles to the police station or who may be deputed for the purpose, to affix his seal to such articles or to take samples of and from them and all samples so taken shall also be sealed with a seal of the officer-in-charge of the police station. She has further submitted that the P.S.I. Harshadrai Zaverbhai Kalavadiya has seized the opium in liquid form from the accused. He has not taken any sample nor he has affixed his seal. The muddamal article was not delivered to the Dhanera Police station in a sealed condition.

16. Ms. Sagar has further submitted that there is violation of the provisions contained in Section 57 of the Act. As per the provisions of Section 57, whenever any person makes any arrest or seizure, under this Act, he shall, within forty-eight hours next after such arrest or seizure, make a full report of all the particulars of such arrest or seizure to his immediate official superior. She has further submitted that PSO Dhanera Police station has sent the wireless message Exh. 33 to SDP, Tharad. However, on this report neither there is any date nor there was any reply in confirmation of having received of the said report and hence, there is violation of the provisions contained in Section 57 of the Act. The report produced at Exh. 33 has not been sent by PSO Dhanera. It appears to have been signed by somebody else whereas provisions contained in Section 55 clearly states that such report should have been made by PSO who has taken possession of such muddamal articles or who has arrested the accused. Ms. Sagar has therefore submitted that there is a violation of the provisions contained in Section 102 (3) of the Cr.P.C.

17. Ms. Sagar has further submitted that PSO Somabhai Manjibhai has received the muddamal article on 11.07.1999 at 06.00 p.m. and was handed over to writer head constable Naranpuri Tejpuri on 12.07.1999. What happened to this muddamal article between the period from 11.07.1999 - 06.00 p.m. to 12.07.1999 – 11.00 a.m. has not come on record nor any explanation is given by the prosecution and hence, she has submitted that there is a possibility that the muddamal articles might have been tampered with.

18. The prosecution has merely relied on the extra judicial confession of the accused and on the basis of his alleged confession before the P.W. Nagjibhai Ajaji Barot it was believed all throughout that he was having the contraband articles with him. However, no procedure as stated herein above was followed by the prosecution witnesses and hence, the prosecution case deserves to be failed.

19. Mr. R. C. Kodekar, learned Additional Public Prosecutor, on the other hand has supported the order and judgment of the learned Special Judge, Deesa and submitted that

there was no violation of any statutory provision and all necessary compliances were made by the raiding parties and/or investigating agency and there was no substance in the argument that the provisions contained in Section 42 (2) as well as 50 & 57 of the Act were violated.

20. Mr. Kodekar has further relied on the decision of the Hon'ble Supreme Court in the case of **G Srinivas Goud vs. State of A.P, reported in (2005)8 Supreme Court Cases 183** wherein while dealing with the argument that the officer conducting the raid did not send copy of the information received by him which led to the search and seizure, to his immediate superior official as required under Sections 42 (2) of the Act and that due to non-compliance with this provision, the case of the prosecution must fail, the Court held, after discussing the case law on the subject that there was no violation of this statutory provision.

21. Mr. Kodekar has further relied on the decision of the Hon'ble Supreme Court in the case of **State of Punjab V/s. Balbir Singh, (1994) 3 S.C.C. 299** wherein it is held that the provisions of Section 52 & 57 are by

themselves not mandatory. These provisions contain certain procedural instructions for strict compliance by the Officers. But if there is no strict compliance of any of these instructions that by itself cannot render the acts done by these Officers null and void and at the most it may affect the probative value of the evidence regarding arrest or search and in some cases it may invalidate such arrest or search. But such violation by itself does not invalidate the trial or the conviction if otherwise there is sufficient material. Therefore, it has to be shown that such non-compliance has caused prejudice and resulted in failure of justice.

22. Based on the aforesaid judgments and the oral evidence as well as the documentary evidence collected by the prosecution during the course of investigation and trial, Mr. Kodekar has submitted that minor irregularities or discrepancies here and there which are of very negligible nature cannot affect the prosecution case about the recovery and seizure of the contraband articles. He has, therefore, submitted that the learned Special Judge, Deesa has discussed at length all the issues which are raised by the appellant-accused in the

present appeal and after considering the same the learned Special Judge, Deesa has come to the right conclusion that there was no violation of any of the provisions of the Act. He has, therefore, submitted that the impugned order and judgment does not call for any interference by this Court while exercising its appellate jurisdiction.

23. We have considered the submissions advanced by Ms. Sadhna Sagar, learned advocate appearing for the appellant - original accused and Mr. R.C. Kodekar, learned Additional Public Prosecutor, appearing for the State of Gujarat at length. We have also undertaken a complete and comprehensive exercise of appreciating all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case. We have also gone through the entire testimonial collections. We have applied our mind to the impugned judgment and order passed by the learned Special Judge, Deesa convicting the accused and sentencing him for the R.I of 10 years and fine of Rs.1 lac and in default thereof, to undergo further R.I of one year.

24. In order to find out whether the prosecution has established the charge against the accused beyond reasonable doubt and whether the learned Special Judge, Deesa has recorded a just and correct conclusion holding the accused guilty, we may first advert to the oral testimony of the prosecution witnesses.

25. Prosecution has examined P.W. 1 - Amratbhai Vaghjibhai Exh. 5 who has found the muddamal opium from the accused person sitting in the cabin of the Truck. P.W. 3 – Nagjibhai Ajaji Barot – Exh. 10 is the complainant and he has sent the report to the P.I. Dhanera Police Station. P.W. 7 – Harshadrai Zaverbhai Kalavadiya – Exh. 21 who is the P.S.I. and Wing Commander has supported the case of the prosecution. P.W. 9 – Naranpuri Tejpuri – Exh. 24 is the Writer Head Constable and he has kept the sample of muddamal article with him. P.W. 10 – Jethabhai Lalbhai – Exh. 26 is the Police Constable who went to F.S.L. with muddamal and deposited it on 13.07.1999. P.W. 11 – Somabhai Manjibhai – Exh. 28 who is the Head Constable and P.S.O. and in his presence, panchnama was drawn and the offence was

registered. P.W. 12 – Ratanjibhai Hirjibhai Chaudhary – Exh. 35 who is P.S.I. and who has filed charge-sheet against the accused. P.W. 13 – Sunilkumar Gangarambhai Patil – Exh. 36 who is the Investigating Officer and who has investigated into the offence and recorded the statements of the witnesses. All these police personnels and Wing Border Guards as well as Officers have supported the case of prosecution. P.W. 2 – Azizbhai Dawoodbhai – Exh. 7 – Truck driver – he turned hostile and did not support the case of the prosecution. P.W. 4 – Raisangbhai Nanjibhai – Exh. 15 – Cleaner of the Truck - he turned hostile and did not support the case of the prosecution. P.W. 5 – Hadmatsinh Sadaji – Exh. 16 and P.W. 6 – Dharsibhai Suratji – Exh. 20 are the panch witnesses. They turned hostile and did not support the case of the prosecution. P.W. 8 – Soni Jitendrakumar Harjivanbhai – Exh. 22 who is an independent witness and who has weighed the muddamal property, turned hostile and did not support the case of the prosecution. Thus the case of the prosecution is only based upon the evidence of police personnels and irrespective of many discrepancies, contradictions, omission and infirmities as well as

alleged violation of the statutory provisions, the learned Special Judge, Deesa has convicted the accused by relying upon the evidence of police witnesses only who have not inspired the confidence of the Court. Major discrepancy which has come on record is that as per the evidence of P.W.1 - Amratbhai Vaghjibhai Exh. 5, the panchas were called at Vasan check post and panchnama was drawn and that Mr. Harshadrai Zaverbhai Kalavadiya has stayed there for about two hours and during this period, he has written something. However, neither the panchnama has come on record nor the report prepared by Mr. Harshadrai Zaverbhai Kalavadiya at Vasan check post. The panchnama which has come on record is the panchnama drawn at Dhanera Police Station. No one has referred to the panchnama drawn at Vasan check post. The prosecution has failed to explain this discrepancy. Either this prosecution witness who has stopped the truck and recovered the muddamal article has told lie to the Court in his deposition or the panchnama might have been drawn at Vasan check post and since it was not found favourable to the prosecution case, the same has not been brought on record. This major discrepancy goes to the root of the matter and

unless and until such discrepancy is properly explained by the prosecution, the accused cannot be convicted on such faulty evidence.

26.It has also come on record from the evidence of P.W. No. 1 - Amratbhai Vaghjibhai that vehicle checking register is maintained at the check post and in that register, vehicle number, driver's name and if any objectionable item is found, necessary entry to that effect is made in that register. However, zerox copy of the vehicle checking register produced at Exh. 12 and the original register produced at Exh. 14 do not indicate anything about the muddamal article which was said to have been recovered from the possession of the accused. Something is stated on oath before the Court and such statement is not found any corroboration from the documents produced before the Court, in that case, the Court is very slow to accept the genuineness and truthfulness of the documents. More over, the zerox copy of one page of vehicle checking register and original vehicle checking register indicate many additions, interpolations, erasion etc. It gives an impression that it has not been properly maintained and

it does not give any correct picture of the description of the events which might have been taken place at the site.

27.The prosecution has simply relied on the alleged confession which has been made by the accused at the time of checking of the vehicle in question. As a matter of fact, in the cabin of the Truck, the driver, cleaner and the accused were sitting and from the mere checking of the Truck, it is difficult to believe that the muddamal article was found from the possession of the accused. To verify the correctness of this version of the prosecution, depositions of driver and cleaner, though they turned hostile, are required to be looked into. The driver - Azizbhai Dawoodbhai in his deposition at Exh. 7 has clearly stated that the person at the checking post has asked them to get down from the Truck. He took the accused in the border wing room and thereafter he told the driver that the accused was having opium in liquid form with him and the Truck was required to be taken to Dhanera Police Station. P.W. 4 - Raisangbhai Nanjibhai – Exh. 15 – Cleaner of the Truck has stated in his deposition that at Vasan check post, when the Truck was

stopped by the Border Wing Guard, he stepped down from the cabin of the Truck and driver as well as accused were taken to border wing room. The person has come out from border wing room and told that opium in liquid form was found from the accused. Thus, none of these persons has supported the case of the prosecution and confirmed the fact that opium was recovered from the possession of the accused. It was only the say of the Border Wing Guard who has come out from the border wing room and told that opium was found from the possession of the accused. Deposition of P.W. 8 - Soni Jitendrakumar Harjivanbhai – Exh. 22 who is an independent witness and turned hostile is also very relevant. He has weighed the muddamal article and he has stated in his deposition that when he went to Dhanera Police Station, only police personnels were present. No outsider person was present. He did not know the accused. He saw a black substance on the table and weighed the same which has weighed approximately 210 Grams.

28. There is also major discrepancy with regard to the movement of the muddamal article at Dhanera Police

Station. It was received at Dhanera police Station at about 6.00 p.m. in the evening on 11.07.1999 and it was received by the P.S.O. who is supposed to be in charge of muddamal article on 12.07.1999. It has not been properly and satisfactorily explained as to where this muddamal was lying during this period and with whom. If such an important thing is not properly explained and the prosecution has based its case on this Muddamal article and remained silent on this evidence, it is difficult to link the accused with the commission of crime and conviction order cannot be confirmed on such a shaky evidence.

29. Though the learned advocate Ms. Sagar has made out a case with regard to violation of statutory provisions, the Court is not basing its judgment only on this point and do not think it proper to discuss it at length. However, coupled with the above referred discrepancies, contradictions, omissions, interpolations, serious irregularities and infirmities in the procedure, the above referred alleged violations of the statutory provisions would certainly weaken the case of the prosecution.

30. We are also convinced to some extent with the submission of Ms. Sagar to the effect that no conscious possession of muddamal article by the accused was proved. The accused was implicated merely on the basis of the alleged confession. The Investigating Agency has not made any further investigation from the driver and cleaner. There was an impression to the effect that they were known to the police personnels and only because of that, no further investigation was made and the accused was implicated in the offence. It has come on record that the accused along with two other old ladies have entered the Truck and all of them were to go to Vasan and in between the Truck was stopped and accused was involved in recovery of the muddamal articles and he was implicated in the offence and ultimately he was convicted. Merely on the basis of shaky evidence, the accused could not have been convicted.

31. In the case of **Thandi Ram V/s. State of Haryana, AIR 2000 S.C. 468**, it is held that despite the fact that no prejudice having been caused to the accused, non-compliance of the provisions contained in Sections 55 & 57 of the Act would certainly render the order of

conviction as bad in law. The Court in that case has also taken into consideration that the appellant – accused has already undergone sentence for nine years. Considering this, the Court has set aside the judgment of the High Court and allowed the appeal acquitting the appellant – accused from the charge levelled against him. In the present case also, as discussed earlier, there is non-compliance of the provisions contained in Sections 55 & 57 of the Act. Over and above this, there are several irregularities, inconsistencies and infirmities in the oral as well as documentary evidence led by the prosecution. The accused has already undergone the sentence of more than 7 years. Considering this, the Court thinks it just and proper to give benefit of doubts to the accused and acquit him from the charges levelled against him.

32. On close scrutiny of the evidence on record and considering the judicial pronouncements on the subject, we express our inability to confirm the findings, ultimate conclusion and the resultant order of conviction and sentence recorded by the learned Special Judge, Deesa. We are not in agreement with the said findings, ultimate conclusion and resultant order of conviction and

sentence as according to us, the conclusion arrived at by the learned Special Judge, Deesa is not tenable at law looking to the facts and in the circumstances of the case.

33. In the above view of the matter, the appeal is allowed. The judgment and order dated 27.09.2000 passed in Special Case No. 139 of 1999 by the learned Special Judge & Additional Sessions Judge, Deesa is hereby quashed and set aside and the appellant – original accused – Raghunathji Bhuraji Nai is acquitted of the charges levelled against him. The appellant – original accused be set at liberty forthwith if his presence is not required in any other case. The amount of fine, if paid, be refunded to the appellant.

[A. M. KAPADIA, J.]

[K.A. PUJ, J.]

S*avariya*